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No. 85-1924

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 91 national and international unions representing approximately 13,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties pursuant to Rule 36.2 of the Rules of this Court.

ARGUMENT

Introduction and Summary

Under § 8(b)(1)(B) of the National Labor Relations Act, as amended, 29 U.S.C., § 158(b)(1)(B) ("NLRA" or "the Act"), it is an unfair labor practice for a union to "restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." In this case the National Labor Relations Board

("NLRB" or "the Board") held that Local 340, International Brotherhood of Electrical Workers ("the Union") violated this prohibition by fining two union members for working in a grievance-adjusting capacity for employers with whom the Union does not have a collective bargaining relationship.

The Board's holding necessarily rests on two premises: first that § 8(b)(1)(B) proscribes not only *direct* union economic pressure on an employer to influence the employer's choice of his representatives but also union conduct which may *indirectly* affect an employer's choice of representatives; and second, that this prohibition extends to union actions whose sole purpose and effect is to discourage union members from accepting positions as management representatives. The brief of the respondent Union assumes the validity of the Board's first premise and demonstrates that, even on that assumption, the second premise is unsound and led the Board to an erroneous decision in this case. The AFL-CIO submits this brief *amicus curiae* because, although we agree with the Union's argument, in our view the Board's fundamental error lies in its first premise.

The "indirect coercion" doctrine was first announced by the Board two decades after § 8(b)(1)(B) was enacted, in *San Francisco-Oakland Mailers' Union No. 18 (Northwest Publications, Inc.)*, 172 NLRB 2173 (1968). The theory of that decision—and the doctrine to which it has given rise—is that: a purpose of § 8(b)(1)(B) is to protect an employer's control over its representatives and that union enforcement of union rules that place obligations on supervisor-members that conflict with the employer's roles therefore violate § 8(b)(1)(B). Pp. 5-7 *infra*.

In *Florida Power & Light v. Electrical Workers*, 417 U.S. 790 (1974) ("*FP&L*"), this Court squarely rejected that understanding of § 8(b)(1)(B). The Court there reasoned that although the Board's interest in assuring employers the undivided loyalty of their super-

visors "is a very real one, the problem is one that Congress addressed, not through § 8(b)(1)(B) but through a completely different legislative route." *Id.* at 807. The Court explained that Congress' solution to that problem was to enact §§ 2(3) and 14(a) of the NLRA which remove supervisors from the definition of "employee" and thereby enable an employer "to demand absolute loyalty from his supervisory personnel by insisting on pain of discharge, that they neither participate in, nor retain membership in, a labor organization." Pp. 7-9 *infra*.

The reasoning of *FP&L* is supported by both the statutory text and its legislative history.

The words of § 8(b)(1)(B), which make it an unfair labor practice for a union "to restrain or coerce . . . (B) an employer in the selection of his representatives . . .," do not naturally suggest a statutory protection of an employer's right to control the representatives the employer has selected. Indeed, in light of the employer's freedom to require its representatives not to associate with a union, the only respect in which union discipline of its members can even affect an employer's "selection of his representatives" by requiring the employer to decide whether he wishes to allow an individual who highly values union membership to serve as his representative. But to conclude that because the employer is put to that choice—free from any union pressure as to which decision he makes—the employer is subject to "restrain[t] or coerc[ion] . . . in the selection of his representatives" strains the statutory language beyond the breaking point. Pp. 9-12 *infra*.

The legislative history compels the same conclusion. It is clear from the evolution of §§ 2(3) and 14(a) that those sections were intended by Congress as a complete solution to the problem of a supervisor-member's conflict of loyalties between his employer and his union. And the legislative history of § 8(b)(1)(B) makes plain that that section was not intended to provide employers with addi-

tional protection in this regard; to the contrary, § 8(b)(1)(B) consistently was described as a narrow provision addressed to direct union pressure being placed on the employer, especially in the context of union attempts to force an employer to bargain through a multiemployer association.

Indeed, to treat § 8(b)(1)(B) as protecting an employer's control over his representatives, as *Oakland Mailers* does, is to ignore: the origins of that section and the political context in which it was enacted; the congressional judgment that underlies §§ 2(3) and 14(a), *viz.*, that divided loyalties are inevitable when union members hold supervisory posts and that the proper solution is to free employers to require supervisors to surrender any union membership; and the congressional policy manifested elsewhere in the Act of avoiding interference in internal union affairs. Pp. 13-21 *infra*.

We recognize, of course, that in *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411, 437 (1978) (*"ABC"*), this Court, in a 5-4 decision, approved the application of § 8(b)(1)(B) to union discipline of supervisor-members, stating that it was "not prepared at this juncture to override" *Oakland Mailers*. The Court did so, in large measure, based on its earlier decision in *FP&L* where the Court had found that the discipline involved in that case did *not* violate § 8(b)(1)(B) but had "assumed without deciding" the validity of other aspects of the *Oakland Mailers* doctrine.

As Justice Stewart, the author of *FP&L* demonstrated in his dissent in *ABC*, *FP&L*'s reasoning cannot be squared with that of *Oakland Mailers*. Yet the Court in *ABC* did not begin from *FP&L*'s logic nor did the *ABC* Court pause to ascertain whether the Board's view comports with the language and legislative history of § 8(b)(1)(B). We therefore respectfully urge the Court to take this occasion to follow the sound premise of *FP&L* and to reject *Oakland Mailers*' unsound reading of § 8(b)(1)(B). Pp. 21-24 *infra*.

Section 8(b)(1)(B) Prohibits Only That Union Conduct Which Directly Pressures an Employer With Respect to the Employer's Choice of His Bargaining or Grievance-Adjusting Representatives.

A. As the NLRB acknowledges in its brief, for the first two decades after it was enacted, § 8(b)(1)(B) was understood by the Board "to prohibit only direct union pressure designed to compel an employer to replace its chosen representative." NLRB Br. at 10 n.3. In *San Francisco-Oakland Mailers*, *supra*, 172 NLRB 2173, however, the Board held that a union violates § 8(b)(1)(B) by disciplining a union member who also serves as a representative of the employer for the manner in which that individual performs his duties as a grievance-adjuster. The Board reasoned that by attempting to "compel the employer's foremen to take prounion positions in interpreting the collective bargaining agreement," the union was "interfering with the [employer's] control over its representatives" and that as a result, "the Employer would have to replace its foremen or face *de facto* nonrepresentation by them"; the Board viewed this as "indirect[]" restraint or coercion of the employer in the selection of his representative. 172 NLRB at 2173-74.

Since *Oakland Mailers*, the Board has continued to interpret § 8(b)(1)(B) to protect an employer's "control over its representatives" and to proscribe any union actions that "interfere with" such control. That understanding of § 8(b)(1)(B) lies at the heart of the "indirect coercion" doctrine that the Board here champions. But as we proceed to show, the Board's interpretation of § 8(b)(1)(B) was rejected in principle by this Court in *Florida Power & Light*, *supra*, 417 U.S. 790, and is inconsistent with the statutory text and its legislative history.

B. In *FP&L* the Court reviewed two NLRB decisions in which unions were found to have violated § 8(b)(1)(B) by disciplining supervisor-members for performing rank-and-file work during the course of a strike against the supervisors' employers, *IBEW System Council U-4 (Florida Power & Light Co.)*, 193 NLRB 30 (1971). *IBEW and Local 134 (Illinois Bell)*, 192 NLRB 85 (1971); both of those cases were decided by the Board on the basis of its holding in the lead case of *IBEW Local 2150 (Wisconsin Electric Power Co.)*, 192 NLRB 77 (1971), *enf'd*, 486 F.2d 602 (7th Cir. 1973), *vacated*, 418 U.S. 902. In *Wisconsin Electric*, the Board had reasoned that, as interpreted in *Oakland Mailers*, § 8(b)(1)(B) establishes a "'general prohibition'" on any union discipline which "'deprives the employer of the undivided loyalty of the supervisor to which it is entitled,'" 192 NLRB at 78, and that disciplining a supervisor-member for working during a strike violates this prohibition:

> The Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors. Thus, the fines, if found to be lawful, would now permit the Union to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform. The Employer could no longer count on the complete and undivided loyalty of those it had selected to act as its collective bargaining agents or to act for it in adjusting grievances. [*Id.*]

And in *Florida Power* the Board summarized its reasoning as follows:

> The Board in *Wisconsin Electric Power* found that the fines there struck at the loyalty an employer should be able to expect from its representatives for the adjustment of grievances and therefore restrained and coerced employers in their selection of

> such representative. We reach the same conclusion here. [193 NLRB at 31]

The *Florida Power* and *Illinois Bell* cases were consolidated for decision by the United States Court of Appeals for the District of Columbia Circuit which denied enforcement of the Board's orders. 487 F.2d 1143. This Court issued a writ of certiorari and affirmed that court's decision.

In doing so, the Court did not dispute the factual assumptions underlying the Board's decisions: that, as explicated by the Board in its brief to this Court, the " 'likely effect' " of permitting unions to discipline supervisor-members for reporting to work " 'is to make [the supervisor] subservient to the union's wishes when he performs [supervisory] functions in the future' " or at least " 'to deprive the employer of the full allegiance of, and control over a representative he has selected for grievance adjustment or collective bargaining purposes.' " 417 U.S. at 807, *quoting* NLRB Br. in No. 73-795, p. 34. Apparently referring to *Oakland Mailers*, the Court stated that "it is precisely that concern that is reflected in . . . recent decisions of the Board holding that [§ 8(b)(1)(B)] . . . may properly be read to encompass any situation in which the union's actions are likely to deprive the employer of the undivided loyalty of his supervisory employees." 417 U.S. at 806. But although acknowledging that "[t]he concern expressed in the argument is a very real one," the Court concluded "*the problem is one that Congress addressed not through § 8(b)(1)(B), but through a completely different legislative route.*" *Id.* at 807 (emphasis added).[1] Writing for the Court, Justice Stewart explained:

> Specifically, Congress in 1947 amended the definition of employee in § 2(3), 29 U.S.C. § 152(3), to

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[1] *See also FP&L*, 417 U.S. at 811 ("the conflict of loyalties problem that the Board has sought to reach under § 8(b)(1)(B) was intended by Congress to be dealt with in a very different fashion").

exclude those denominated supervisors under § 2(11), thereby excluding them from the coverage of the Act. Further, Congress enacted § 14(a), 29 U.S.C. § 164(a), explicitly providing:

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

Thus, while supervisors are permitted to become union members, Congress sought to assure the employer of the loyalty of his supervisors by reserving in him the right to refuse to hire union members as supervisors, the right to discharge such supervisors because of their involvement in union activities or union membership, and the right to refuse to engage in collective bargaining with them. [*Id.* at 807-08; citations omitted]

Justice Stewart went on to review the legislative history of § 2(3) and § 14(a) in order to demonstrate that "Congress' dominant purpose in [enacting those provisions] was to redress a perceived imbalance in labor-management relationships that was found to arise from putting supervisors in the position of serving two masters with opposed interests." *Id.* at 811. The Court also examined the legislative history of § 8(b)(1)(B) and found that "[t]he specific concern of Congress was to prevent unions from trying to force employers into or out of multiemployer bargaining units." *Id.* at 803. Based on this review of those materials Justice Stewart concluded:

> Congress' solution [to the problem of conflicting loyalties] was essentially one of providing the employer with an option. On the one hand, he is at liberty to demand absolute loyalty from his super-

> visory personnel by insisting, on pain of discharge, that they neither participate in, nor retain membership in, a labor organization. Alternatively, an employer who wishes to do so, can permit his supervisors to join or retain their membership in labor unions, resolving such conflicts as arise through the traditional procedures of collective bargaining. But it is quite apparent, given the statutory language and the particular concerns that the legislative history shows what motivated Congress to enact § 8(b)(1)(B), that it did not intend to make *that* provision any part of the solution to the general problem of supervisor-member conflict of loyalties. [*Id.* at 812-13; emphasis in original] [2]

C. The conclusion the Court reached in *FP&L*—that § 8(b)(1)(B) is not "any part of the solution to the general problem of supervisor-member conflict of loyalties"—is confirmed by the statutory language and its legislative history. And those materials compel the further conclusion—to which the analysis of *FP&L* clearly points—that § 8(b)(1)(B) prohibits only *direct* and not "*indirect*" coercion of employers.

1. We start, of course, with the statutory text. Section 8(b)(1) provides:

> It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce

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[2] Although *FP&L* squarely rejected the *reasoning* of *Oakland Mailers*, the Court in *FP&L* refrained from deciding whether the actual holding of *Oakland Mailers* was erroneous; it was enough for the *FP&L* Court that, unlike *Oakland Mailers*, the supervisors in *FP&L* were being disciplined for performing rank-and-file work and not for the manner in which they had performed supervisory duties. *See* 417 U.S. at 804-05 ("assum[ing] without deciding that the Board's *Oakland Mailers* decision fell within the outer limits of the statute" and distinguishing that decision from *FP&L*); *see also id.* at 798 (suggesting that *Oakland Mailers* stretches § 8(b)(1)(B) beyond "the metes and bounds of the statutory language"); *ABC*, 437 U.S. at 442 n.5 (Stewart, J., dissenting) ("adher[ing] to the view expressed by the Court in *FP&L* that [*Oakland Mailers*] is at best within the 'outer limits' of § 8(b)(1)(B)").

> (A) employees in the exercise of the rights guaranteed in section 7 . . . or (B) and employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

The most natural reading of these words is that subsection (A) addresses union conduct directed at *employees* and subsection (B) addresses union conduct directed at *employers*. Plainly, when a union wages a strike or exerts other economic pressure against an employer to secure the appointment or the removal of a particular employer representative, the union is "restrain[ing] or coerc[ing] . . . an employer in the selection of his representatives." Such union conduct "clearly fall[s] within the metes and bounds of the statutory language." *FP&L*, 417 U.S. at 798.

The words of § 8(b)(1)(B) do not, however, naturally suggest a statutory protection of an employer's right to control his representative nor do these words naturally suggest a limitation on a union's power to discipline a union member whom an employer voluntarily chooses as his representative. While such discipline arguably can be seen to restrain or coerce the *union member*,[3] it

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[3] Given that union membership under the NLRA has been construed to be purely voluntary—no one can be required to join a union, *cf. NLRB v. General Motors*, 373 U.S. 734 (1963), and one who joins is free to leave the union at any time, *see Pattern Makers v. NLRB*, —— U.S. ——, 53 L.W. 4928 (June 27, 1985)—it is far from clear that requiring one who chooses to join and remain a member of a union to fulfill the obligations of membership that the individual voluntarily assumes can be considered to "restrain or coerce" the union member. In *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), *Scofield v. NLRB*, 394 U.S. 423 (1969), and *NLRB v. Boeing Co.*, 412 U.S. 67 (1972), the Court concluded that union fines of union members who had refrained from participating in concerted union activities did *not* restrain or coerce those members (and hence did not violate § 8(b)(1)(A)) notwithstanding the fact that in those cases the members were fined for exercising § 7

is difficult, if not impossible, to fit the union's conduct into the "metes and bounds" of § 8(b)(1)(B) which protects an employer from restraint or coercion in selecting his representative. Whatever the impact of union discipline on union members, the employer retains an unfettered choice—free from any union pressure—to decide whether he wishes a union member who is subject to the demands the union makes on union members to serve as the employer's representative.

Finding in § 8(b)(1)(B) a prohibition on union discipline of supervisor-members is even more difficult when the other provisions of the LMRA on which the Court relied in *FP&L*—specifically §§ 2(3) and 14(a)—are considered. The first of those sections provides that the term "employee" as used in the Act "shall not include . . . any individual employed as a supervisor"; the second states that "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either

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rights). But in *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968), the Court ruled that a union violated § 8(b)(1)(A) by fining a union member for filing an unfair labor practice charge against the union.

Marine & Shipbuilding Workers was decided long before this Court in *Pattern Makers* held that union members have the right to resign at any time—and at a time when the governing assumption seems to have been to the contrary. *See ABC*, 437 U.S. at 436 (assuming validity of rule restricting membership resignation). Because that is so—and because the decision in *Marine & Shipbuilding Workers* has the anomalous result of requiring the NLRB and the Courts to "focus on the legitimacy of the union interest vindicated by [a union] rule" in order to decide whether the enforcement of that rule restrains or coerces union members, *Scofield v. NLRB*, *supra*, 394 U.S. at 431—we believe that in an appropriate case the vitality of *Marine & Shipbuilding Workers* should be reconsidered in light of *Pattern Makers*. The issue is not raised in the instant case, however, as the question here is whether the union's discipline restrained or coerced the employer in the selection of its representatives.

national or local, relating to collective bargaining." As a consequence of these provisions, an employer "is at liberty to . . . insist[], on pain of discharge that [its supervisors] neither participate in, nor retain membership in a labor organization." *FP&L*, 417 U.S. at 812. And given that freedom, it is simply not true, as the Board claimed in *Oakland Mailers*, that if unions were permitted to discipline supervisor-members, "[r]ealistically, the Employer would have to replace its foremen or face *de facto* nonrepresentation by them." P. 5 *supra*. Under §§ 2(3) and 14(a), a *third* option, not taken into account by the Board, is open to the employer, one that allows the employer to choose whomever he wants to be his representative without fear of divided loyalty: *the employer is left free by the law to insist that his supervisors not associate with a union.*

In light of the foregoing, the *only* respect in which union discipline can be said to affect an employer's "selection of his representatives" is that, with respect to an individual who values union membership more than a position as an employer representative that requires renunciation of union membership, the employer is put to the choice of deciding whether he wishes to allow such an individual to serve as a supervisor and to retain union membership. But to conclude that because the employer is put to that choice—free from any union pressure on the employer as to *which* decision he makes—the employer is subject to "restrain[t] or coerc[ion] . . . in the selection of his representatives" strains the statutory language beyond the breaking point. And to read § 8(b)(1)(B) as saving the employer from that choice—as assuring the employer that if he hires as his representative a union member who maintains his union membership, that individual will not owe conflicting obligations to the union—is to give § 8(b)(1)(B) a meaning not remotely suggested by its words.

2. The legislative history of the Labor Management Relations Act of 1947 ("LMRA"), like the language of § 8(b)(1)(B), cuts deeply against the Board's theory.

The legislative materials pertaining to the development of § 8(b)(1)(B) are set forth at length in the brief of the respondent Union in this case; we shall not burden the Court by reviewing these materials a second time. But before discussing the significance of those materials to *Oakland Mailers'* theory of § 8(b)(1)(B), we first pause to review the evolution of §§ 2(3) and 14(a) of the LMRA because, as this Court recognized in *FP&L*, those sections, and their legislative history, throw a cross light on the meaning of § 8(b)(1)(B).

(a) The legislative history of §§ 2(3) and 14(a) begins in 1946, when the NLRB, in *Packard Motor Car Co.*, 61 NLRB 4 (1945), *aff'd* 330 U.S. 485 (1947), overruled several prior decisions and held that supervisors were employees within the meaning of the Wagner Act and thus had the right to form a union and bargain collectively with their employer. Almost immediately efforts began in Congress to overrule that decision.

In the House, the first serious attempt to overrule *Packard Motor* came in the form of the Case bill, H.R. 5262, 79th Cong 2d Sess (1946), which was offered, 92 Cong. Rec. 836-38, and adopted, *id.* at 1027, 1067-70, on the floor of the House as a substitute for a labor law bill which the House Labor Committee had reported, H.R. 4908, 79th Cong., 2d Sess. (1946).[4] Section 12 of the Case bill provided that "no supervisory employee shall have the status of an employee for the purpose of sections 7, 8 and 9 of the National Labor Relations Act." Representative Case stated the theory of this section of the bill as follows: "No man can serve two masters. . . . That is all

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[4] The Labor Committee's bill was one President Truman had requested to provide for a fact-finding process and cooling-off period in labor disputes vitally affecting the public interest. *See* H.R. Rep. No. 1493, 79th Cong. 2d Sess. (1946).

that is involved here." 92 Cong. Rec. 5390. Significantly, the Case bill did not include an analogue to § 8(b)(1)(B).

After the Case bill passed the House, the Senate Labor Committee took up the bill. That Committee reported out a bill which did not include any provision addressed to the supervisor issue. *See* S. Rep. 1177, 79th Cong. 2d Sess. (1946). But in a dissenting statement, Senator Ball, writing for himself, Senator Taft and Senator Smith, urged adoption of an amendment to deny supervisors any "rights as an 'employee'" under the NLRA; Senator Ball stated that this proposal was designed to "meet this issue in a practical and realistic manner," and explained the basis for his proposal as follows:

> Foremen now occupy an anomalous position under the National Labor Relations Act. They are both management and labor or sometimes one and sometimes the other, without regard to the conflict inherent in such a situation.
>
> * * * *
>
> The NLRB has found regularly that there can be no true collective bargaining if management interferes with the designation of the bargaining agent of the workers. It is equally true that there can be no effective collective bargaining if the agent of the workers interferes with the personnel which, as a part of management, carries out the orders of management and exercises control over production, discipline, and the administration of the labor contract. The capture of the element of management, and the compromising or impairment of the undivided loyalty of any element of management, by a labor organization is an interference with the function of management. [S. Rep. 1177, *supra*, Pt. 2, at 19.]

Like the Case bill, Senator Ball's proposed amendment did not include any provision comparable to § 8(b)(1)(B).

When the Labor Committee's bill was debated on the floor of the Senate, Senator Ellender offered as an amendment a variant of the Ball proposal to remove supervisors from the NLRA; that amendment, too, did not contain an analogue to § 8(b)(1)(B). 92 Cong. Rec. 5698. Senator Ellender explained that his amendment was "an essential one" which would rectify "the anomalous situation of having a Federal statute which was enacted primarily for the benefit of the workers being construed so as to permit unions which already represent the workers to become also the legal representatives of the very men whom management has hired to supervise the rank and file." *Id.* The Ellender amendment was agreed to by the Senate by a vote of 43-30, *id.* at 5705,[5] and with this and other amendments, the Case bill was approved by the Senate, *id.* at 5739, in a form to which the House acceded, *id.* at 5946. President Truman vetoed the bill, however, and the House failed to override that veto. *Id.* at 6674-78.

The following year, early in the session of the Eightieth Congress, the House Labor Committee reported out the Hartley bill; like the Case bill and Ball and Ellender amendments, the Hartley bill excluded "supervisors" from the NLRA's definition of "employee" and did not include any provision similar to § 8(b)(1)(B). H.R. 3020, § 2(13), 80th Cong. 1st Sess. 1947), *reprinted in* 1 Legislative History of the Labor Managment Relations Act of 1947 at 34 (hereinafter "Leg. Hist.").[6] The House Committee stated that the status of supervisors

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[5] Significantly, in light of the fact that he later authored § 8(b)(1)(B), Senator Morse voted against the Ellender amendment. 92 Cong. Rec. 5705.

[6] The Hartley bill had a sweeping definition of "supervisor" which included anyone 'who is employed to act . . . for the employer in dealing with other individuals employed by the employer" and anyone who receives information "that is not available to the public . . . or to employees generally." H.R. 3020 § 2(12), *supra*, 1 Leg. Hist. at 40-41.

was "one of the most important and critical problems" in the Wagner Act:

> [E]mployers as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, even in a union that claims to be "independent" of the union of the rank-and-file, they are subject to influence and control by the rank-and-file.
>
> * * * *
>
> Supervisors are management people. . . . No one forced them to become supervisors. They abandoned the "collective security" of the rank-and-file voluntarily because they believed the opportunities thus opened to them to be more valuable to them than such "security." . . .
>
> * * * *
>
> The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its "expertness", changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust. [H.R. Rep. No. 245, 80th Cong. 1st Sess. at 16-17 (1947).]

The House adopted the Hartley bill without significant amendment. *See* 1 Leg. Hist. at 158-226.

In the Senate, the Labor Committee, chaired by Senator Taft, held extensive hearings on a series of bills introduced by Senator Ball, two of which contained identical provisions to remove supervisors from the protection of the NLRA, *see* S. 55, 80th Cong., 1st Sess. § 202 (1947); S. 360, 80th Cong., 1st Sess. § 2 (1947), and neither of which contained an analogue to § 8(b)(1)(B). The Labor Committee reported out a bill containing a variant of the Ball proposal (with a narrower definition of the term "supervisor"), *see* S. 1126, 80th Cong., 1st

Sess. §§ 2(3), 2(13) (1947), 1 Leg. Hist. at 102-104, and also containing a variant of what is now § 8(b)(1)(B); as explained in the Union's brief in this case, the latter section was taken from bills introduced by Senators Morse and Ives.

The Senate Labor Committee justified its proposed §§ 2(3) & 2(13) as follows:

> It is natural to expect that unless this Congress takes action, management will be deprived of the undivided loyalty of its foremen. There is an inherent tendency to subordinate their interests whenever they conflict with those of the rank and file. . . .
>
> In recommending the adoption of this amendment, the committee is trying to make clear what Congress attempted to demonstrate last year when it adopted the Case bill. . . . It should be noted that 'all that the bill does is to leave the foremen in the same position in which they were in until the Labor Board reversed the position it had originally taken . . . In other words, the bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. It merely relieves employers who are subject to the national act free from any compulsion by the National Board or any local agency to accord to the front line of management the anomalous status of employees. [S. Rep. No. 105, Pt. 1, 80th Cong., 1st Sess. at 5 (1947).]

And Senator Taft, in explaining those provisions of the bill to the Senate, put it this way:

> The bill provides that foremen shall not be considered employees under the National Labor Relations Act. They may form unions if they please, or join unions, but they do not have the protection of the National Labor Relations Act. They are subject to discharge for union activity, and they are generally restored to the basis which they enjoyed before the passage of the Wagner Act.

* * * *

> It is felt very strongly by management that foremen are part of management; that it is impossible to manage a plant unless the foremen are wholly loyal to the management . . . The Committee felt that foremen either had to be a part of management and not have any rights under the Wagner Act, or be treated entirely as employees, and it was felt that the latter course would result in the complete disruption of discipline and productivity in the factories of the United States. [2 Leg. Hist. at 1008-09]

See also 2 *Id.* at 1064 (Sen. Ellender), 1946 (Sen. Ball).

The Taft bill was approved by the Senate without change to its provisions regarding the "employee" status of supervisors, *see* 1 Leg. Hist. 230, 232, 264; the House, in conference accepted the Senate's definition of "supervisor," *see* H.R. Rep. No. 510, 80th Cong., 1st Sess. at 35 (1947); and that version ultimately was enacted into law as part of the LMRA.

(b) There can be no doubt, in light of the foregoing, that, as the Court stated in *FP&L*, §§ 2(3) and 14(a) were enacted as "the solution to the general problem of supervisor-member conflict of loyalties." 417 U.S. at 813. Those sections give employers the right "to demand absolute loyalty from his supervisory personnel by insisting, on pain of discharge, that they neither participate in nor retain membership in a Labor organization." *Id.* There is no hint in the legislative materials that any of the sponsors of those sections viewed the privilege created thereby as inadequate to protect employers fully from supervisors with divided loyalties; indeed the fact that neither the Case bill, the Ball and Ellender amendments, the Hartley bill, nor the Ball bills contained any provision similar to § 8(b)(1)(B) demonstrates that the sponsors of §§ 2(3) and 14(a) viewed those sections as sufficient in and of themselves to "meet th[e] issue" (p. 14 *supra*) and to protect employers from the problem of disloyal supervisors.

Against this background, the question posed by the interpretation of § 8(b)(1)(B) announced in *Oakland Mailers* is simply this: did Congress, in enacting that section, intend to give employers *additional* protection with respect to the conflicting loyalty problem. Several considerations compel a negative answer to that question.

First, and most important, the legislative history of § 8(b)(1)(B), reviewed in detail in the Union's brief in this case, contains no evidence of any such intent. To the contrary, that section consistently was described as a narrow provision addressed to direct union pressure being placed on the employer, especially in the context of union attempts to force an employer to bargain through a multiemployer association.

Nor is it plausible to believe in light of the origins of the section (in bills introduced by Senators Morse and Ives); the identity of its supporters (including the Democratic minority in the Senate); and the political context in which it was enacted (first by a Senate Labor Committee in which Senators Morse and Ives held the balance of power, and second by a full Senate in which the support of moderate Senators like Senator Ives was critical in order to obtain the votes necessary to override a presidential veto) that there was any broader, *unarticulated* intent underlying § 8(b)(1)(B). Indeed, to so conclude it would be necessary to hypothesize that Senators Morse and Ives, supported by Senator Murray and his allies, sought to create for employers a broader protection than Representatives Case or Hartley or Senators Ellender and Ball deemed necessary, and that this broader protection was considered so obvious and noncontroversial as not to merit even a mention during the legislative consideration of the bill. Such a hypothesis collapses of its own weight.

Second, to view § 8(b)(1)(B) as addressing the issue of conflicting loyalties is to turn Congress' approach to this issue on its head. For Congress' solution to the di-

vided loyalty problem was (in contemporary parlance) one of deregulation: Congress excluded supervisors from the NLRA's definition of "employee," and expressly preempted any state law granting similar rights to supervisors, *so that employers would have a self-help remedy available to deal with supervisors whose loyalty was divided.* Congress did so because it believed that supervisors who belonged to unions were "*inherent[ly]*" in a position of conflict. P. 13 *supra.* Yet *Oakland Mailers* purports to resolve what Congress understood to be this inevitable conflict—and for which Congress provided a self-help remedy—by a classic *regulatory* means: under that decision the Board claims the power to invalidate any union conduct which, in the Board's view, interferes with an employer's control over his representatives.

The ultimate upshot of this regulation could not be more anomalous. Whereas Congress intended supervisors to be non-persons in the eyes of the NLRA—to "restore" the law as it was "before the passage of the Wagner Act," p. 17 *supra*, the Board has granted supervisors a *preferred* status: supervisors alone may receive all of the benefits of union membership without being held accountable for breaching the duties of such membership.

Third, and finally, the Board's approach to § 8(b)(1)(B) ignores *other* values embedded in the LRMA, aside from the goal of protecting employers from supervisors with conflicting loyalties. In particular, the Board's interpretation ignores the determination of Congress—and especially of Senators such as Senator Ives, whose support was critical to overriding President Truman's veto—to avoid interfering in internal union affairs. That determination is most clearly evident in the Senate's debate over § 8(b)(1)(A), which debate is reviewed in the Union's brief in this case. And *Oakland Mailers* trenches on the congressional policy evidenced in that debate by allowing the Board to preclude unions from enforcing valid union rules, reflecting legitimate

trade union considerations, whenever, in the Board's view, such enforcement would threaten an employer's control over his representatives.

(c) In sum, the statutory language and its history prove that the Court correctly concluded in *FP&L* that § 8(b)(1)(B) is not and was not intended to be "any part of the solution to the general problem of supervisor-member conflict of loyalties." P. 9 *supra*. That being so, the Board in *Oakland Mailers* erred in extending § 8(b)(1)(B) to reach "indirect" coercion of employers, as the decision in that case rests on the mistaken theory that § 8(b)(1)(B) is a "general prohibition" on union conduct which "deprives the employer of the undivided loyalty of the supervisor." P. 5 *supra*.

D. Against this background we turn to this Court's decision in *American Broadcasting Co. v. Writers Guild*, *supra*, 437 U.S. 411, which, we acknowledge, accepts *Oakland Mailers*' understanding of § 8(b)(1)(B).

(1) The question in *ABC* was whether § 8(b)(1)(B) prohibits a union from disciplining a supervisor-member who, during the course of a strike, performs supervisory work. In two cases decided shortly before it decided *ABC*, the Board had answered that question in the affirmative, concluding that such discipline was impermissible because of its "adverse carry-over effect" on the supervisors' future performance of their § 8(b)(1)(B) functions. *Chicago Typographic Union No. 16 (Hammond Publishers)*, 216 NLRB 903, 905 (1975), *enf'd*, 539 F.2d 242 (D.C. Cir. 1976); *see New York Typographical Union No. 6 (Triangle Publications)*, 216 NLRB 896 (1975). Overturning the decision of its Administrative Law Judge in *Hammond Publishers* who had understood *FP&L* to teach that when such adverse effects result from a "conflict of interests for supervisors" they are not the concern of § 8(b)(1)(B), 216 NLRB at 915 (ALJ opinion), the Board reasoned as follows:

> The Supreme Court stated that an employer may not permit a supervisor to become a union member

> and yet continue to be able to demand "absolute loyalty" from that supervisor. We interpret this to mean that an employer who permits his supervisors to become union members may no longer demand the loyalty of these supervisors if they cross a picket line and, in effect, substitute their services for those of rank-and-file employees. In this regard, however, we do not believe that the Supreme Court's decision is so broad that it means that an employer surrenders his right to require the loyalty of these same supervisors when they cross a picket line and thereafter perform substantial supervisory functions . . . [*Id.* at 905].

In its decision in *ABC* the Court agreed with the Board's conclusion that union discipline of supervisor-members for performing supervisory duties during the course of a strike deprives employers of a § 8(b)(1)(B) right to "require the loyalty" of such supervisors. The Court reasoned, in essence, that in light of the likely effect of the discipline on the supervisor-members, "[f]or an employer in these circumstances to insure having satisfactory collective-bargaining and grievance-adjustment services would require a change in his representative." 437 U.S. at 435. And the Court concluded that this impact sufficed to establish a violation of § 8(b)(1)(B):

> As the Board has construed the Act from *Oakland Mailers* to *Triangle* [*Publications*], *Hammond* [*Publishers*] and the cases now before us, such a likely impact on the employer constitutes sufficient restraint and coercion in connection with the selection of collective-bargaining and grievance-adjustment representatives to violate § 8(b)(1)(B). In *FP&L* the Court declined the invitation to overrule *Oakland Mailers*, and we do so again. [*Id.*, at 435-36.]

In reaching this conclusion, the Court rejected the union's argument that the employer could avoid the dilemma the Court posited—and thereby avoid any "impermissible coerc[ion]"—by following the course emphasized in *FP&L*: "requir[ing] the [supervisor-member] to

leave the union and thus free himself from further threats of union discipline." *Id.* at 426. Significantly, the Court did not fault the logic of the union's position. Instead the Court stated that

> if the argument were to be accepted, indirect pressure on the employer by sanctioning supervisor-members for the manner in which they perform their grievance-adjusting function (as in *Oakland Mailers*) would never be a violation because the supervisor could, at the employer's request, escape from union threats and sanctions. The Board's construction of the Act is to the contrary, however, and, as we have said, we are not prepared at this juncture to override it. [*Id.* at 437]

Justice Stewart, the author of *FP&L*, vigorously dissented from the majority's decision in *ABC*. Unlike the majority, who viewed *FP&L* as supporting—indeed almost compelling the decision in *ABC*—Justice Stewart was of the opposite view. He reasoned that the Court "clearly held in *FP&L* [that] an employer's remedy if he does not want to share the loyalty of his supervisors with a union is to insist that his supervisory personnel not belong to a union," *ABC*, 437 U.S. at 441 (Stewart, J., dissenting), and that *FP&L*

> flatly rejected the argument that union discipline aimed at enforcing uniform rules violated § 8(b)(1)(B) simply because it might have the ancillary effect of "depriv[ing] the employer of the full allegiance of, and control over, a representative he has selected for grievance adjustment or collective bargaining purposes." [*ABC*, 437 U.S. at 439-40 (Stewart, J., dissenting); emphasis in original]

(2) As Justice Stewart's *ABC* dissent demonstrates, *ABC's* major premise conflicts with *FP&L's* reasoning. For notwithstanding the fact that the supervisors did rank-and-file work during the strikes in *FP&L* and supervisory work during the strike in *ABC*, the likely effect of the union discipline was indistinguishable in the two

cases. And the principal lesson of *FP&L* is that, in light of the employer's right under § 2(3) to require his representatives to refrain from joining a union, the effect of union discipline on supervisors whom an employer allows to retain their union membership is *not* a basis for finding a violation of § 8(b)(1)(B).

The Court in *ABC* was, of course, correct in recognizing that the logic of this lesson extends not only to cases in which supervisor-members are disciplined for strike-breaking but to any case involving union discipline of its members. But the *ABC* Court's belief that *FP&L* had rejected that conclusion finds no support in the Court's opinion in *FP&L:* while it is true, as the Court in *ABC* stated, that *FP&L* had "declined the invitation to overrule *Oakland Mailers*," *ABC*, 437 U.S. at 436, it is equally true that *FP&L* declined the invitation to *endorse Oakland Mailers*. *See FP&L*, 417 U.S. at 804-05 ("We may assume *without deciding* that the Board's *Oakland Mailers* decision fell within the outer limits of the statute"); *see also* n.2 *supra*. Thus *FP&L* left *open* the continuing vitality of *Oakland Mailers*. And while *ABC* answered that question, it did so without confronting the logic of *FP&L* or of the 1947 Congress, and it did so without providing a basis in principle for sustaining the Board's doctrine. We therefore respectfully urge the Court to follow the sound logic of *FP&L*.

E. One final point needs to be made. The *Oakland Mailers* doctrine is not only contrary to the language and legislative history of § 8(b)(1)(B), but also produces results at war with the policies of the Act as a whole. The decision in *ABC* provides a clear illustration.

As Justice Stewart observed in his dissenting opinion in that case, the end result of the Court's decision in *ABC* is to tip the "balance of power" between labor and management "measurably in favor of the employer at the most delicate point of direct confrontation, by completely preventing the union from enlisting the aid of

its supervisor-members in a strike effort." 437 U.S. at 442. (Stewart, J., dissenting). Stated more simply, *ABC* "prevents a union with supervisory members from effectively calling and enforcing a strike." *Id.* at 440-41 (Stewart, J., dissenting).

Nothing in the legislative history remotely suggests that § 8(b)(1)(B) was intended to have this effect; indeed, given the origins of that section and the political context in which it was enacted, it is most implausible to attribute such an intent to Congress. To so read § 8(b)(1)(B) it again is necessary to assume that Senators Morse and Ives (joined by Senators Murray and his allies) created a protection for employers that neither Representative Hartley nor Senator Ball had deemed necessary, and that this added protection was so readily agreeable that to all so concerned it went wholly unnoticed during the legislative debates.

Moreover, as this Court has repeatedly stated, the NLRA seeks "generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 835 (1984). And as Justice Blackmun has explained:

> Because the employees' power protected in the NLRA is the power to act collectively, it has long been settled that the collective has a right to promulgate rules binding on its members, so long as the employee's decision to become a member is a voluntary one and the rules are democratically adopted . . . Unless internal rules can be enforced, the union's status as bargaining representative will be eroded, and the rights of the members to act collectively will be jeopardized. "Union activity, by its very nature, is group activity, and is grounded on the notion that strength can be garnered from unity, solidarity and mutual commitment. This concept is of particular force during a strike, where the in-

> dividual members of the union draw strength from the commitments of fellow members, and where the activities carried out by the union rest fundamentally on the mutual reliance that inherences in the 'pact.'" [*Pattern Makers v. NLRB*, *supra*, 53 L.W. at 4934 (dissenting opinion).]

In sum, because it protects the broader policies of the NLRA and vindicates the specific legislative judgments embodied in § 8(b)(1)(B) and §§ 2(3) and 14(a), *FP&L*—rather than *Oakland Mailers*—states the proper understanding of the reach of § 8(b)(1)(B).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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